STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 91-22

Date issued: December 18, 1991

Requested by: Craig M. Hagen, Commissioner of Labor

- QUESTION PRESENTED -

Whether North Dakota minimum wage and work conditions orders adopted by the North Dakota Commissioner of Labor under N.D.C.C. ch. 34-06 apply to state employers.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that minimum wage and work conditions orders adopted by the North Dakota Commissioner of Labor under N.D.C.C. ch. 34-06 do not apply to state employers, and that those employers are covered by the federal Fair Labor Standards Act, 29 U.S.C. ' 201, et seq.

- ANALYSIS -

N.D.C.C. ch. 34-06 authorizes the Commissioner of Labor to investigate conditions of labor and wages and hours of employees in North Dakota, and to adopt minimum wage and work conditions orders applicable to those employees. N.D.C.C. ' 34-06-03.

The terms "employee" and "employer" are defined as:

> "Employee" includes any individual employed by an employer. Provided, an individual is not an "employee" while engaged in a ride sharing arrangement, as defined in section 8-02-07.
>
> "Employer" includes any individual, partnership, association, corporation, or any person or group of persons acting in the interest of an employer in relation to an employee.

N.D.C.C. ' 34-06-01(2) and (3). Neither of the above definitions for the chapter on minimum wage and work conditions orders includes state employers. Interpreting the language of those sections in its ordinary sense, because a contrary intent does not plainly appear, and using the words in their context and according to the approved usage of the language, there is no express legislative intent to include state employers in this state as subject to chapter 34-06. See N.D.C.C. " 1-02-02 and 1-02-03.

In a case involving the application of federal labor law to the United States government, the United States Supreme Court indicated it could not interpret the Norris-LaGuardia Act to define the term "employer" to include the United States where there was no express reference to the United States in the Act

and no affirmative grounds for believing that Congress intended to include the government in that Act.

The Supreme Court stated:

> "There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."

United States v. United Mine Workers of America, 330 U.S. 258 (1947).

The North Dakota Supreme Court has cited the United Mine Workers case with approval in an opinion holding that city employees were not authorized to strike, even though North Dakota law, N.D.C.C. ' 34-09-01, authorized other employees to do so. City of Minot v. General Drivers and Helpers Union No. 74 of Minot, 142 N.W.2d 612 (N.D. 1966). The North Dakota Supreme Court determined that the North Dakota "Little Norris-LaGuardia Act", N.D.C.C. ch. 34-08, did not apply to the City of Minot. The Court recited numerous aspects of city government and the need for police protection, fire protection, health protection, garbage collection, water and sewer services, street repair and maintenance and other services as indicators that city employees were not authorized to strike in the same manner as employees of private organizations.

A conclusion that the Legislature did not intend N.D.C.C. ch. 34-06 to apply to state employers is supported by its enactment of a minimum wage law for state employees. N.D.C.C. ' 54-06-16. The following testimony and comments made at the House Committee hearing on the bill in 1971 are instructive:

> Rep. Ed Metzger: One of the sponsors. Last summer I was around the Jamestown area and about 900 state employees after two years earned less than $4,000 a year.
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> Rep. Haugland: That means 900 under the poverty level.
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> Rep. Metzger: Appropriations are used as seen fit in each department.
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> Rep. Strinden: Will we have to break it down for each budget?
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> Rep. Herman: With inflation maybe they don't gain, how about a resolution?
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> Metzger: Have tried for 3 terms.
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> Haugland: Have tried for 26 years. It is a disgrace.
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> Metzger: If the administrators would have taken care of it this bill would not have been necessary.

> Strinden: Legislature does not stand alone in raising of the salaries, it is also up to the Governor and the administrators.

Hearing on H. B. 1503 Before the House Comm. on Industry, Business and Labor, 42nd N.D. Leg. (Feb. 3, 1971).

The enactment of N.D.C.C. ' 54-06-16 indicates the legislature believed it had the responsibility for determining compensation criteria for state employees.

N.D.C.C. ' 34-06-01 does not by its terms give the Labor Commissioner authority over minimum wages for state agency employees. An interpretation granting that authority to the Labor Commissioner would divest state agencies of a pre-existing right of control over compensation of their employees without any express legislative authorization to do so. In addition to section 54-06-16, the enactment of the Merit System Council for certain state employees under N.D.C.C. ch. 54-42, and the enactment of the Central Personnel System including a classification and compensation plan under N.D.C.C. ch. 54-44.3, make it apparent that the legislature intended to maintain authority over state employee compensation. It is therefore my opinion that the minimum wage and work conditions orders adopted under N.D.C.C. ch. 34-06 do not apply to employment by a state agency. This opinion is consistent with a previous opinion of this office. 1974 Op. Att'y Gen. 391.

It is important to note, however, that the federal Fair Labor Standards Act, 29 U.S.C. ' 201, et seq., does apply to employees of state agencies. In that Act, the term "employee" means:

> "(C) Any individual employed by a state, political subdivision of a state, or an interstate governmental agency, other than such an individual
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> (i) who is not subject to the civil service laws of the state, political subdivision, or agency which employs him; and
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> (ii) who
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> I. holds a public elective office of that state, political subdivision, or agency,
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> II. is selected by the holder of such an officer to be a member of his personal staff,
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> III. is appointed by such an office holder to serve on a policy making level,
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> IV. is an immediate advisor to such an office holder with respect to the constitutional or legal powers of his

> office, or
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> V. is an employee of the legislative branch or legislative body of that state, political subdivision, or agency and is not employed by the legislative library of such state, political subdivision, or agency."

29 U.S.C.A. ' 203(e)(2)(c) (1991). "Public Agency" includes "the government of a state or political subdivision thereof" and "any agency of . . . a state, or a political subdivision of a state." 29 USCA ' 203 (x) (1978). See Garcia v. San Antonio Metro Transit Authority, 469 U.S. 528 (1985).

Therefore state employee compensation issues are regulated by the Fair Labor Standards Act.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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